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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

FLORIDA SEED COMPANY, INC., *et al.*,
Petitioners,

v.

MONSANTO COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners Florida Seed Company, Inc. ("Florida Seed") and Frit Industries, Inc. ("Frit") hereby reply to the Brief in Opposition submitted by Respondent Monsanto Company ("Monsanto"). In their Petition and below, Petitioners alleged that Monsanto engaged in a pattern of unlawful, anticompetitive conduct designed to maintain or expand monopoly power [1] in the market for residential non-selective herbicides. For purposes of the present case, the critical step in Monsanto's pattern of illegal conduct centered on Monsanto's refusal to deal with Florida Seed as a distributor of a product that the Federal Trade Commission ("FTC") had required Monsanto to divest for competitive reasons.

In response to the Brief in Opposition, Petitioners submit that (i) they challenge the monopolization efforts of Monsanto and do not seek to challenge or unravel the Ortho acquisition; (ii) it is the power to raise prices above or reduce output below competitive levels which is the primary focus of the antitrust laws; (iii) the wooden approach to federal antitrust standing analysis utilized by the Eleventh Circuit in this case is contrary to established precedent of this Court and other circuit courts; (iv) distributors who are excluded from the market for anticompetitive purposes have standing to complain of violations of Section 2 of the Sherman Act; and (v) Petitioners are not precluded from pursuing a private right of action by the existence of an FTC consent decree.

If the opinion below is permitted to stand, a dangerous narrowing of the private right of action to bring federal antitrust claims will result. Without a full review and reversal by this Court, an entire class of private plaintiffs (distributors) will be foreclosed from pursuing federal antitrust claims if their injuries happen to follow a merger or acquisition by the defendant.

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[1] That is, the power to raise prices above or reduce output below competitive levels.

I. MONSANTO IMPROPERLY CASTS THE CASE AS A CHALLENGE TO A MERGER.

As it did in the court below, Monsanto paints this case as one involving a challenge to a merger rather than one involving a challenge to a refusal to deal as part of a scheme to monopolize the relevant market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The reasoning behind Monsanto's mischaracterization is simple; it perceives that the standing jurisprudence available to it under Section 7 of the Clayton Act is more favorable than the jurisprudence applying Section 2 of the Sherman Act. Unfortunately, Monsanto's mischaracterization was accepted by the court below.[2] As noted in the Petition, the Eleventh Circuit plainly viewed the case as a challenge to the Ortho acquisition, even though the court of appeals acknowledged that Petitioners did not appeal the district court's denial of standing under Section 7 of the Clayton Act. *Compare* Pet. App. A at 5a-6a (referring to "that which makes a merger unlawful") *with* Pet. App. A at 3a n.1 (acknowledging that denial of standing under Section 7 of the Clayton Act was not appealed).

The challenged conduct in this case is monopolization of the relevant market effectuated through Monsanto's emasculation of the distribution channels for the Kleenup product. As alleged in the Complaint, Monsanto disrupted the distribution of Kleenup, and its viability as a competitive product, by terminating certain distributors, like Florida Seed, that had the right to distribute only one brand of residential non-selective herbicide—Kleenup. R1-1-18, 19.[3] Monsanto's anticompetitive actions ensured that

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[2] Although it is of no consequence, it should be noted that Monsanto asserts in its Brief in Opposition ("Monsanto Brief") that "Judge Tjoflat wrote for a unanimous panel of the United States Court of Appeals for the Eleventh Circuit. . . ." Actually, the opinion was written by Judge Dubina.

[3] Citations to the record refer to the volume, the document number and the page of the record maintained by the district court clerk.

Kleenup would be at a competitive disadvantage to Monsanto's Roundup product. In short, the Complaint charges that Monsanto injured Florida Seed in order to injure competition itself.

Petitioners' monopolization claim sought no relief in respect of Monsanto's acquisition of Ortho—it neither sought to enjoin the acquisition nor sought damages in respect of it. Rather, Petitioners sought damages flowing from Florida Seed's exclusion from the market for "the manufacturing and formulation of non-selective herbicides as well as the *marketing and selling* of non-selective herbicide products for residential use. . . ." R1-1-2, 3 (emphasis added). In their zeal to fit this case into a body of "uniform precedent" under Section 7 of the Clayton Act, Monsanto and the lower court either misperceived or mischaracterized Petitioners' monopolization claim as one seeking to attack "an allegedly anti-competitive upstream merger." *See, e.g.*, Monsanto Brief at 15. The acquisition gave Monsanto the means to weaken the competing brand, but the monopolization claim at issue here challenges the anticompetitive scheme that resulted in Petitioners' exclusion from the market; Petitioners do not attack the acquisition itself.

II. MONSANTO IS WRONG IN SUGGESTING THAT AN ANTITRUST PLAINTIFF MUST SHOW AN ACTUAL INCREASE IN PRICE OR REDUCED OUTPUT.

Monsanto attempts to persuade this Court that an antitrust plaintiff must assert an actual increase in price or reduced output in order to have standing to bring a claim under Section 2 of the Sherman Act. Monsanto Brief at 4. Monsanto's narrow view directly contradicts the teachings of this Court. *See American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) ("[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude

competition when it is desired to do so."); *see also, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 482-83 (1977).

According to Petitioners' Complaint, "[a]t all times relevant to this action, Monsanto has . . . possessed the power to control price and exclude competition in the relevant market." R1-1-10. Monsanto's assertions are not to the contrary. In fact, Monsanto boasts that had the FTC not stepped in, Monsanto would have destroyed completely the competition that existed between its Roundup product and Ortho's Kleenup. Monsanto Brief at 3. Of course, Monsanto's aspirations of withdrawing the availability of glyphosate, the crucial ingredient in most nonselective herbicides, did not come about and this case must be analyzed under the facts alleged in the Complaint, not a hypothetical account of different ways Monsanto might have flexed its competitive muscle.

III. MONSANTO URGES THIS COURT TO ADOPT A PER SE RULE OF ANTITRUST STANDING CONTRARY TO ESTABLISHED PRECEDENT, AND CITES DISTINGUISHABLE AUTHORITY TO SUPPORT ITS POSITION.

Monsanto would have this Court sanction a rule of law that former distributors who are terminated for any reason following a merger or acquisition always must be denied antitrust standing. Monsanto Brief at 7-10. Monsanto's reasoning is flawed for several reasons. Monsanto relies primarily on cases in which distributors challenged purportedly anticompetitive mergers themselves, not anticompetitive actions following the merger. None of the authorities cited by Monsanto relate to situations in which a defendant obtained temporary control over the product which served as its chief competitor. Thus, interbrand competition is implicated in this case in a way that was not present in any case cited by Monsanto. Monsanto has cited no authorities discussing the misuse of power over a temporarily-controlled product to destroy its distribution channels and thereby stifle competition. The effi-

ciency concerns that have driven most of the decisions cited by Monsanto simply are not applicable where a supplier is given a brief period of control over a product with which it must compete in the future.

The Court should note that Monsanto's brief is strangely silent with respect to Petitioners' discussion of the effect on this case of *Construction Aggregate Transp., Inc. v. Florida Rock Indus.*, 710 F.2d 752 (11th Cir. 1983). *See* Pet. at 16-17. Instead, Monsanto relies principally upon decisions that are readily distinguishable because they involved plaintiffs that were injured only derivatively, rather than directly. *See, e.g., G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762 (2d Cir.), *cert. denied*, 116 S.Ct. 381 (1995).[4] In *Honickman*, the Second Circuit considered the antitrust standing under Section 2 of the Sherman Act of distributors that lost their distributorships under circumstances much different from those presented here. The plaintiff distributors in *Honickman* contended that the defendant engineered a competing bottler's financial collapse so that the defendant could acquire that bottler's assets without igniting competitive concerns by the FTC, and the plaintiff distributors were injured because their distribution contracts disappeared when the bottler failed.

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[4] Monsanto also tries to make the decision in *Sierra Wine & Liquor Co. v. Heublein, Inc.*, 626 F.2d 129 (9th Cir. 1980) support its position by taking that court's holding out of context. Monsanto cites *Sierra Wine & Liquor* for the proposition that a terminated distributor asserting a monopolization claim can never have standing. Monsanto Brief at 18. In reality, that court determined that the plaintiff did not have standing because the plaintiff had failed to prove the existence of a combination in violation of the antitrust laws. *Id.* at 134. Because the plaintiff was not terminated by the manufacturer which purportedly had attempted to monopolize the relevant market, but another party which the plaintiff had failed to prove acted in concert with the manufacturer, the plaintiff failed to connect its injury to the monopolizing manufacturer. *Id.* In contrast, Florida Seed has alleged that Monsanto directly injured Florida Seed in its efforts to monopolize the relevant market.

According to the Second Circuit, the plaintiff distributors in *Honickman* lacked antitrust standing because they did not suffer antitrust injury. *Id.* at 766. The basis for the Second Circuit's decision was that the plaintiffs' injuries were merely derivative of the injuries suffered by the bottler. *Id.* According to the allegations of the plaintiffs in *Honickman*, the defendant directly waged its attack against its competitor in the bottling sector of the soft drink market. Therefore, the anticompetitive acts in *Honickman* were made directly against the bottler and the resulting harm to the plaintiff distributors was merely a byproduct of that attack on the bottler. *Id.* ("It follows naturally that a party in a business relationship with an entity that failed as a result of an antitrust violation has not suffered the antitrust injury necessary for antitrust standing.")

In this case, by contrast, the injuries sustained by Florida Seed were direct—Monsanto directed its anticompetitive conduct at Florida Seed in order to impair the Kleenup brand. Thus, Florida Seed's injuries were not merely a byproduct of competitive damage done to the Kleenup brand. Rather, those injuries were the means by which the Kleenup brand was weakened.

Moreover, the core anticompetitive actions complained of here occurred after Monsanto's acquisition of the Ortho assets but before the FTC's Consent Decree was carried out. Whereas the defendant in *Honickman* had achieved its monopoly by acquiring the competing bottler and could have been expected to look for the most efficient means of distribution, Monsanto, by virtue of the FTC's divestiture requirement, was in a position to tighten its monopoly position over residential non-selective herbicides by terminating effective and efficient distributors of its former and future competitor. The present situation is also distinguishable from *Honickman* because Monsanto has enjoyed and continues to enjoy patent protection on glyphosate, the key ingredient in the residential non-selective herbicides Roundup and Kleenup. *See* R1-1-3 to -6. This fact

gave Monsanto a degree of control unlike the defendant in *Honickman* because of the extremely high barriers to entry into the residential non-selective herbicide market. *See* R1-1-4 (¶ 10). Finally, the plaintiffs in *Honickman* distributed only the products of Honickman, whereas Florida Seed distributed a product (Kleenup) that was, and pursuant to the Consent Decree would continue to be, directly competitive with Monsanto's Roundup product.

IV. MONSANTO'S ATTEMPT TO DISCREDIT THE PRECEDENT CITED BY PETITIONERS IS UNAVAILING.

Monsanto is wrong when it suggests that the cases cited in the Petition support only the standing of a terminated distributor to complain of conspiracies under Section 1 of the Sherman Act. Monsanto Brief at 12-13. At best, Monsanto's distinction is one that makes no difference: why would a terminated distributor have standing to complain of a collateral anticompetitive scheme where a refusal to deal is concerted, but lack standing where a firm with monopoly power engages in exclusionary conduct to preserve or expand its market dominance? The cases discussed by Monsanto do not make Monsanto's distinction between Section 1 and Section 2 claims, and there is no sound basis to do so.[5]

Moreover, Monsanto's position is at odds with a line of authority from this Court dating back to *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (single seller's right to refuse to deal not unlimited). Indeed, one of the primary cases relied upon by Monsanto clearly supports

[5] Petitioner recognizes that standing under Section 7 of the Clayton Act may in fact be governed by a more restrictive standard that is based on the rationale "for condemning the merger." *See* Monsanto's Brief at 9-10 (quoting Professors Areeda & Hovenkamp). As noted previously, Petitioners do not seek to condemn the Ortho merger. Here, Florida Seed's exclusion from the market was the means by which output was restricted and the competing brand crippled. *See id.* (focusing on the means by which output is restricted).

Petitioners' position that a refusal to deal by a single supplier having a collateral anticompetitive purpose to monopolize a relevant market is actionable. *See Universal Brands, Inc. v. Philip Morris Inc.*, 546 F.2d 30, 33 (5th Cir. 1977) ("If the refusal to deal is a device used to acquire a monopoly . . . or to establish market dominance and drive out competition . . . it is illegal."). The *Universal Brands* language is especially applicable where, as here, the "driving out" of competition took the form of excluding efficient distributors of a competing brand.

In addition to overlooking these authorities, Monsanto makes the erroneous assertion that *General Indus. Corp. v. Hartz Mtn. Corp.*, 810 F.2d 795 (8th Cir. 1987), which supports Florida Seed's position,[6] only involved a claim under Section 1 of the Sherman Act. Monsanto Brief at 13. In fact, the decision in *Hartz* revolved primarily around an attempted monopolization claim under Section 2 of the Sherman Act. Monsanto's description of the case is, at best, incomplete.

V. FLORIDA SEED DOES NOT ATTEMPT TO ENFORCE THE FTC CONSENT DECREE AND THE CONSENT DECREE DOES NOT PRECLUDE PRIVATE ACTIONS AGAINST MONSANTO.

Monsanto urges that Florida Seed is not a proper party to bring an action against Monsanto because Monsanto had entered into a Consent Decree with the FTC, noting that consent decrees are not enforceable by private third parties. Monsanto Brief at 14-15. Again, Monsanto is wide of the mark. Florida Seed does not attempt to

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[6] In *Hartz*, the Eighth Circuit determined that a distributor that was terminated pursuant to attempted monopolization by its supplier because it distributed a competing brand could bring an antitrust action under Section 2 of the Sherman Act. *See id.* at 807 ("The jury could reasonably have concluded that in effectively preventing [competitive brand] products from reaching consumers, [the supplier] harmed both [the distributor] and the competition in the market.).

enforce the FTC Consent Decree and has never asserted as much.

It is without question that the entry of the Consent Decree between Monsanto and the FTC does not preclude a private action by a third party such as Florida Seed. It has been recognized that "the entry of [a] consent decree is not an adjudication on the merits that can give rise to issue preclusion. . . ." *United States v. Alex Brown & Sons, Inc.*, 169 F.R.D. 532, 540 n.4 (S.D. N.Y. 1996). Likewise, this Court has held that the United States may not be precluded from pursuing an action for antitrust violations even where the same actions were previously ruled upon in a private action. *United States v. Borden Co.*, 347 U.S. 514 (1954). As later confirmed by this Court, " 'private and public actions were designed to be cumulative, not mutually exclusive.' " *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961), *quoting Borden*, 347 U.S. at 518. As noted by this Court in each of the two decisions cited above, "[d]ifferent policy considerations govern [government suits and private suits]. They may proceed simultaneously or in disregard of each other." *Id.* (internal citations omitted). Opinions in the circuit courts have reached a similar conclusion. *See, e.g., I.A.M. National Pension Fund v. Industrial Gear Mfg. Co.*, 723 F.2d 944, 949 & n.7 (D.C. Cir. 1983) (consent decree not a basis for issue preclusion).

The authorities cited by Monsanto for the unremarkable proposition that a private party may not enforce an FTC consent decree do not preclude independent private antitrust actions based on post-acquisition misconduct. *See Federal Trade Comm'n. v. Owens-Corning Fiberglas Corp.*, 853 F.2d 458, 463 (6th Cir. 1988) ("We express no view as to whether [a private party] could have brought a private contract or tort action, or any other action, against the Trustee individually."); *Ambrook Enters. v. Time, Inc.*, 612 F.2d 604, 612-13 n.14 (2d Cir. 1979) (viewing consent decree as historical fact). To hold otherwise would be tantamount to declaring "open sea-

son" for anticompetitive behavior in the aftermath of a consent decree. In this instance, the Consent Decree is an historical fact that in no way operates to deny standing to Florida Seed. In any event, Florida Seed's Complaint refers to Monsanto's violation of the FTC order as part of the pattern or scheme of anticompetitive behavior engaged in by Monsanto to preserve its market dominance, not as a freestanding, actionable wrong.[7]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[7] It is surprising that Monsanto finds support for its view in the FTC's recent civil penalty against a supermarket chain for failing to preserve the viability of assets pending divestiture. Monsanto's Brief at 15 n.8. The entire basis for Monsanto's Brief and the decision below is that Florida Seed's exclusion from the market entails no antitrust injury because it does not flow from that which makes defendant's acts unlawful. Why then would the FTC be concerned about the viability of distribution channels, brand names and the like pending divestiture as it apparently was both in the case of the Ortho acquisition and in the example cited by Monsanto? The FTC's action against Schnucks underscores the competitive threat associated with post-acquisition conduct aimed at unfairly impeding competition, and in so doing, underscores the error below.